OCBC Bank (Malaysia) Bhd v Aluran Intelek Sdn Bhd

HIGH COURT (KUALA LUMPUR) — PERFORMANCE APPLICATION NO 38–12–2000
KAMALANATHAN RATNAM J
16 FEBRUARY 2001

Land Law *— Order for sale — Application to set aside order for sale — Public auction did not proceed at time stipulated — Whether conditions of sale may be varied by deputy registrar — Whether order of deputy registrar perfected — Whether notice had to be served on chargor — National Land Code 1965 s 258(1)(a)*

This is an application by the defendant to set aside an order for sale of the defendant's land which was charged to the plaintiff in respect of loan facilities granted to the defendant by the plaintiff. The defendant's land was to be sold by way of public auction. The proclamation of sale stated that bidders ought to deposit 10% of the reserve price by 9.15am and that the balance of the price ought to be paid in full to the Deputy Registrar (the 'DR'). A bidder, Thanimalai a/l Pathaperumal, had his deposit rejected as he had failed to make the deposit before 9.15am. Both the defendant and Thanimalai maintained that the said auction only proceeded at 11.15am although it was stipulated to proceed at 9.30am. The defendant's land was then sold to two other persons. The defendant's initial application contained two further prayers for an order that the two subsequent purchasers be made parties to the proceedings, and for an injunction to restrain the plaintiff and the two subsequent purchasers from completing the order for sale. The defendant withdrew these two prayers prior to their hearing and agreed that the court hear only the prayer relating to the sale. Thanimalai maintained in his affidavit that if his deposit had been accepted, property could have been sold at a higher price.

Held:

(1) The learned DR was right in rejecting Thanimalai's deposit which was made at 9.20am, but the learned DR had no power to vary the time of the auction. Firstly, there was an order already made on 22 May 2000 by the same DR that the said auction would be held at 9.30am at the place stipulated. The said order was perfected. It did not contain any order enabling her to vary her own order. She was therefore bound by her own order. Besides, no reasons have been offered as to why the DR did not proceed with the sale at 9.30am. The plaintiff and the two successful bidders have failed to address the court on this issue. (see p 474G–I).

(2) The chargee had indeed prepared the conditions of sale in accordance with the terms of the order of the court dated 22 May 2000. In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, the Supreme Court held that any

variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor was ultra vires the authority to sell under the National Land Code 1965 (the 'NLC') (see p 475D–E).

(3) In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, it was held that the effect of extending the time of payment of the balance purchase price 'is to cause material change in the conditions of sale and thus render it no longer in accordance with or within the terms or directions of the original order and determination by the Senior Assistant Registrar'. The court was of the view that the amended conditions of sale bearing some different terms or directions from the original conditions must be served again in accordance with s 258(1)(a) of the NLC on the chargor. Similarly in this case, if the auction was to be held at 11.15am, this fresh condition ought to have been served afresh on the defendant/chargor (see p 475G–I).

[**Bahasa Malaysia summary**

Kes ini adalah mengenai permohanan defendan untuk mengenepikan perintah jualan tanah defendan yang telah digadaikan kepada plaintif oleh kerana defendan telah meminjam wang daripada plaintif. Tanah defendan tersebut sepatutnya dilelongkan. Proklamasi jualan menyatakan bahawa orang yang hendak membuat tawaran dikehendaki membayar simpanan sebanyak 10% daripada harga jualan tanah tersebut sebelum pukul 9.15am, dan baki harga jualan dikehendaki dibayar kepada Timbalan Pendaftar ('TP'). Simpanan Thanimalai a/l Pathaperumal, seorang yang telah membuat tawaran untuk tanah tersebut, telah ditolak kerana beliau gagal membayar simpanannya sebelum 9.15am. Defendan dan Thanimalai menyatakan bahawa lelong tersebut hanya bermula pada 11.15am walaupun ia sepatutnya bermula pada 9.30am. Tanah defendan kemudiannya dijual kepada orang lain. Permohonan awal defendan mengandungi dua permohonan lanjutan untuk perintah untuk menjadikan dua pembeli pihak kepada prosiding, dan untuk injunksi supaya plaintif dan kedua-dua pembeli disekat daripada menyempurnakan perintah jualan tersebut. Defendan telah menarik balik kedua-dua permohonan tersebut sebelum pembicaraan dan telah bersetuju bahawa mahkamah hanya mendengar permohonan yang berkait dengan jualan tersebut. Thanimalai berkata di dalam afidavitnya bahawa jikalan simpanannya diterima, tanah tersebut boleh dijual pada harga yang lebih tinggi.

Diputuskan, :

(1) TP yang bijaksana adalah betul dalam menolak simpanan Thanamalai yang dibuat pada 9.20am, tetapi TP yang bijaksana tidak mempunyai kuasa untuk menukar masa lelong tersebut.

Pertamanya, telah wujud suatu perintah daripada TP pada 22 Mei 2000 yang telah menetapkan bahawa lelong tersebut akan bermula pada 9.30am dan tempat lelong tersebut. Perintah tersebut telahpun disempurnakan. Ia tidak mengandungi sebarang perintah untuk membolehkannya mengubah perintahnya sendiri. Jadi, beliau terikat oleh perintahnya sendiri. Lagipun, tiada alasan diberi untuk ubahan masa lelong tersebut dari 9.30am. Plaintif dan dua orang yang berjaya membuat tawaran telah gagal untuk berucap kepada mahkamah di atas isu ini (lihat ms 474G–I).

(2) Pemegang gadaian telah menyediakan syarat-syarat jualan mengikut terma-terma perintah mahkamah yang bertarikh 22 Mei 2000. Dalam kes *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, Mahkamah Agung telah memutuskan bahawa sebarang perubahan kepada perintah jualan mahupun terma-terma yang dibuat tanpa atau tanpa penyampaian notis kepada penggadai adalah ultra vires kuasa untuk menjual di bawah Kanun Tanah Negara 1965 ('KTN') (lihat ms 475D–E).

(3) Dalam kes *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, ia telah diputuskan bahawa kesan melanjutkan tempoh membayar baki harga jualan 'is to cause material change in the conditions of sale and thus render it no longer in accordance with or within the terms or directions of the original order and determination by the Senior Assistant Registrar' Mahkamah berpendapat bahawa pindaan kepada syarat-syarat jualan yang mengandungi terma-terma yang berlainan daripada syarat-syarat asal dikehendaki disampaikan lagi ke atas penggadai mengikut s 258(1)(a) KTN. Dengan itu, jikalau lelong tersebut bermula pada 11.15am, syarat baru ini perlulah disampaikan sekali lagi ke atas defendan/penggadai (lihat ms 475G–I).

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712.

Cases referred to

Bank Bumiputra Malaysia Bhd v Pentadbir Tanah Daerah Gombak [1992] 1 MLJ 78 (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (folld)

Legislation referred to

National Land Code 1965 s 258(1)(a)

S Susheila (*Shook Lin & Bok)* for the plaintiff.
Francis Pereira (*Francis Pereira & Shan*) for the defendant.
K Thilaga (*Soo Thien Ming & Nashrah*) for the proposed intervenor.

Kamalanathan Ratnam J

The application

This is the defendant's application to set aside an order for sale of the defendant's land held under HS (D) 86672, No PT 375, Mukim Damansara, Daerah Petaling, Selangor (the said property), by public auction held on 29 June 2000.

Facts

The defendant charged his said property to the plaintiff in respect of loan facilities granted to the defendant by the plaintiff. Since the defendant had defaulted, the plaintiff obtained an order for sale of the said property by public auction. The order of the court was made on 22 May 2000 and it contained, inter alia, terms that the said sale was to be held on 29 June 2000 at 9.30am at the auction room of the High Court of Kuala Lumpur at a reserve price of RM350,000. The defendant was notified of the auction by the court by way of a letter dated 22 May 2000. The letter which was exhibited to the defendant's affidavit in support of his application read as follows:

> Adalah dimaklumkan bahawa mahkamah akan melelong harta No Hakmilik HS (D) 86672 pada 29 Jun 2000 jam 9.30 pagi di BILIK LELONG, MAHKAMAH TINGGI KUALA LUMPUR, WISMA DENMARK, JALAN AMPANG, KUALA LUMPUR. Harga rizab yang ditetapkan oleh mahkamah ialah RM350,000.

The proclamation of sale likewise contained similar details and in addition it stated that bidders at the auction ought to deposit 10% of the reserve price by way of a bank draft by 9.15am of the date of the auction and that the balance of the price ought to be paid in full to the deputy registrar (DR) of the High Court of Kuala Lumpur within 90 days of the date of the sale. One Thanimalai a/l Pathaperumal affirmed an affidavit in support of the application in which he stated that he had arrived at the place of auction at 9.20am with the intention of bidding at the said auction. He had with him a Standard Chartered cashier's order for RM35,000 being the 10% deposit of the reserve price. The learned DR refused to accept his deposit as he had failed to make the deposit before 9.15am. Both the defendant and the said Thanimalai maintained that the said auction only proceeded at 11.15am although it was stipulated to proceed at 9.30am. The said property was then sold to two other persons for RM352,000. Initially this application contained two further prayers, namely, (1) for an order that the subsequent two purchasers be made parties to these proceedings, and two for an injunction to restrain the plaintiff and the subsequent two purchasers from completing the order for sale. Prior to the commencement of the hearing of the said application, the defendant withdrew these two prayers and by

consent parties agreed that I proceed to hear only the prayer relating to the sale. Thanimalai maintained in his affidavit that if his deposit had been accepted, the property could have been sold at a higher price.

Findings of the court

Indeed, there is no dispute that the auction did proceed only at 11.15am and not at the time set by the court in its order dated 22 May 2000 and as published in the proclamation of sale and which was to be at 9.30am. What is most surprising is that in their reply affidavits, neither the plaintiff nor the successful bidders addressed this issue. To a question from the court as to why the learned DR did not proceed with the sale at 9.30am as ordered by the court, Ms Susila for the plaintiff referred me to the conditions of sale which stated that the deposit was to be paid by 9.15am. She maintained that there was no condition that the auction would proceed at 9.30am.

Whilst I agree that in order to qualify as a bidder, prospective bidders ought to deposit the 10% of the reserve price by 9.15am, it seems to me that the plaintiff has totally ignored the terms set in the proclamation of sale. In my judgment the unassailable facts in the proclamation of sale reflect the order of the court dated 22 May 2000, that is, that the said auction would take place:

(1) on 29 June 2000;

(2) at 9.30am; and

(3) at the Auction Room, Mahkamah Tinggi Kuala Lumpur, Tingkat 8, Wisma Denmark, Jalan Ampang, Kuala Lumpur.

That the deposit ought to be paid to the DR by 9.15am by intended bidders was a condition set by the DR. To my mind, it makes sense that if the auction was to be at 9.30am, there must be a cut-off point by which time the deposit must be paid. Otherwise, even as the auction was proceeding, intending bidders might be able to join in.

It is my judgment that the learned DR was right in rejecting Thanimalai's deposit which was made at 9.20am, but it is also my judgment that the learned DR had no power to vary the time of the auction. Firstly, there was an order already made on 22 May 2000 by the same DR that the said auction would be held at 9.30am at the place stipulated. The said order was perfected. It did not contain any order enabling her to vary her own order. She was therefore bound by her own order. Besides, no reasons have been proffered as to why the DR did not proceed with the sale at 9.30am. She could not have been waiting for the price to be raised. Since Thanimalai's deposit had been rejected, it must mean that the two successful bidders must have paid their deposit well before 9.15am. Then why did she not proceed to call for the auction to commence at 9.30am. The plaintiff and the two successful bidders have failed to address the court on this issue. In any case the successful bidders had offered RM2,000 above the reserve price to clinch the deal. In *Bank Bumiputra Malaysia Bhd v*

Pentadbir Tanah Daerah Gombak [1992] 1 MLJ 78, Eusoff Chin J (as the former Chief Justice then was) said at p 84 as follows:

> In the case of an order of sale made by the court, the court's order made under s 257(1) and the other directions with respect to the sale made by the court under s 257(2) shall form part of the 'conditions of sale' which the chargee has to prepare under s 258(2)(a) of the NLC. Section 258 of the NLC states:
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> Procedure prior to sale
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> (1) Where any such order has been made, it shall be the duty of the Registrar of the court–
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> (a) to serve a copy thereof on the chargor, and on every chargee of the land or lease in question; and
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> (b) to see that the sale is publicly advertised in accordance with rules of court or, in the absence of any rule in that behalf, the practice customarily adopted in the State.
>
> (2) The chargee on whose application the order was made shall–
>
> (a) prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the court.

It is therefore clear that the chargee had indeed prepared the conditions of sale in accordance with the terms of the order of the court dated 22 May 2000. In *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 SC the then Supreme Court held that any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor was ultra vires the authority to sell under the National Land Code 1965 (NLC). In respect of this Wan Yahya SCJ said at p 309 as follows:

> … We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration in the terms or conditions must likewise be exercised.
>
> We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is ultra vires the authority to sell under the NLC.

In *Frozen Foods*, the Supreme Court held that the effect of extending the time of payment of the balance purchase price 'is to cause a material change in the conditions of sale and thus render it no longer in accordance with or within the terms of the original order and determination made by the SAR'. The court was of the view that the amended conditions of sale bearing some different terms or directions from the original conditions must be served again in accordance with s 258(1)(a) of the NLC on the chargor. Similarly in this case, if the auction was to be held at 11.15 am, this fresh condition ought to have been served afresh on the defendant/chargor.

Having considered all the issues, I granted the defendant an order in terms of its prayer but made an order for each party to bear its own costs. I think I was wrong in making such an order with regard to costs. Since my order has not, as yet been perfected, I order that the defendant's costs of this application be paid by the plaintiff.

Order accordingly.

Reported by Wong Ee Lynn